



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: September 26, 2008

CBCA 982-C(50)-R

TIDEWATER CONTRACTORS, INC.,

Applicant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Joseph A. Yazbeck, Jr., of Yazbeck, Cloran & Hanson, LLC, Portland, OR, counsel for Applicant.

David Sett, Division Counsel, Federal Highway Administration, Department of Transportation, Lakewood, CO, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **FENNESSY**.

SOMERS, Board Judge.

The Board granted an appeal by Tidewater Contractors, Inc. (Tidewater) in which Tidewater sought an extension of contract time resulting from the Government's delay in the issuance of a notice to proceed. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525; *modified on reconsideration*, 07-2 BCA ¶ 33,618. As a result, the contract completion date was extended by eighty-nine days. The Government, which had assessed liquidated damages against Tidewater after the appeal had been filed, issued a unilateral modification as a result of the decision and remitted to Tidewater \$160,200, representing the amount that had been withheld from Tidewater.

On November 26, 2007, Tidewater filed an application for fees and other expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000) (EAJA). After the Government filed its response to the EAJA application, Tidewater filed a motion for summary relief, seeking an order to compel the Government to pay interest on the amount held for liquidated damages pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (CDA). We held that the Board did not possess jurisdiction to entertain Tidewater's claim for CDA interest because Tidewater failed to file a claim for the return of liquidated damages with the contracting officer. Without a claim, we concluded that Tidewater would not be entitled to CDA interest. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 982-C(50), 08-2 BCA ¶ 33,908, at 167,790 (citing *Hettich & Co., GmbH*, ASBCA 35239, 88-2 BCA ¶ 20,699, at 104,597-98, *aff'd in part and remanded*, 873 F.2d 1451 (Fed. Cir. 1989) (table); *Hunter Manufacturing Co., Inc.* ASBCA 34209, 87-2 BCA ¶ 19,903, at 100,690).

Tidewater now asks us to reconsider our decision. It asserts that the Board failed to consider a letter that Tidewater submitted to the contracting officer on January 30, 2006,¹ which Tidewater contends presents its claim for the return of the liquidated damages. As we have noted previously, the Board does not grant reconsideration on the basis of arguments already made and reinterpretations of old evidence. 07-2 BCA at 166,501. The argument presented by Tidewater now is the same legal argument presented before. Whether Tidewater asserted a separate claim for liquidated damages in the January 30, 2006, letter or in the November 1, 2007, letter, as we noted previously, the contracting officer never issued a final decision on that claim. Nor did Tidewater file an appeal on the basis of a denial or "deemed denial" of its claim. Thus, we do not possess jurisdiction over Tidewater's alleged claim and cannot grant the relief now sought.

Attempting an end run around this jurisdictional bar, Tidewater suggests that the January 30, 2006, letter should be construed as

. . . essentially an amendment to the complaint under [Department of Transportation Board of Contract Appeals (DOTBCA)] Rule 14.^[2] As the January 30, 2006 letter served

¹ Tidewater has submitted an unsigned, "true copy" version of the letter. Applicant's Motion for Reconsideration, Exhibit 4.

² Originally, this appeal had been filed before the Department of Transportation Board of Contract Appeals, and had been governed by the rules of procedure of that Board. The appeal was transferred to the Civilian Board of Contract Appeals pursuant to the consolidation of the various civilian agency boards of contract appeals. *See* Pub. L. No.

as an amendment to the claim a request for CDA interest was in turn made relative to this claim and a separate appeal was not required.

Applicant's Motion for Reconsideration at 3.

We reject the notion that the January 30, 2006, letter could be considered as an amendment of the complaint. Pursuant to DOTBCA Rule 14(a), the DOTBCA would "in its discretion and within the proper scope of the appeal, permit either party to amend its pleadings upon conditions just to both parties." Tidewater never moved to amend its pleadings, nor did this Board issue an order permitting Tidewater to amend its complaint.

Finally, Tidewater argues that its purported claim for the remission of liquidated damages is within the proper scope of its original appeal, and, accordingly, did not require the filing of a separate appeal. This is palpably incorrect. As a general matter, the scope of an appeal is circumscribed by the parameters of the claim, the contracting officer's decision, and the contractor's appeal. *AEC Corp.*, ASBCA 42920, 03-1 BCA ¶ 32,071, at 158,488 (2002). Tidewater's original claim sought an extension of the contract time period. At the time that Tidewater filed its claim, the Government had not assessed liquidated damages against Tidewater. The contracting officer's decision was limited to denying Tidewater's request for an extension of the contract time period. Tidewater's appeal was limited to challenging the basis for the contracting officer's decision denying the request. Tidewater's claim for the remission of liquidated damages could not be considered part of the original claim for contract extension because it arose subsequent to the filing of an appeal of the first claim. See *AAB Joint Venture v. United States*, 68 Fed. Cl. 363, 365-66 (2005); *J. Cooper & Associates v. United States*, 47 Fed. Cl. 280, 287 (2000).

Decision

For the reasons detailed above, appellant's motion for reconsideration is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

EILEEN P. FENNESSY
Board Judge